Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1659

DESERT OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

THE ~~PEOPLE OF THE STATE OF~~ CALIFORNIA, ~~acting by and through THE~~ DEPARTMENT OF TRANSPORTATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, entered November 26, 1979.

OPINION BELOW

The opinion by the Court of Appeal of California appears in Appendix A.

JURISDICTION

In May, 1972, Respondent, State of California, filed a civil action for removal of four of Petitioner's outdoor advertising displays under the provisions of the Federal Highway Beautification Act as implemented by the California Outdoor Advertising Act. After reversal of earlier partial judgments, the matter came on for trial in February, 1978, in the Superior Court of San Diego County. At that time, the State stipulated that two of the boards be removed, *with* compensation as provided by the Acts; and the trial court entered judgment on April 14, 1978, that the two remaining boards were subject to removal *without* compensation.

Petitioner appealed as to the two boards for which compensation was denied, and the Court of Appeal of California, Fourth Appellate District, Division One affirmed the trial court's judgment on November 26, 1979. A Petition for Hearing to the Supreme Court of the State of California was denied on January 24, 1980, and this Petition for Certiorari is being filed within ninety (90) days of that date. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

(1) THE CALIFORNIA COURTS IMPROPERLY CONSTRUED AND INTERPRETED 23 U.S.C. 131(g), WHICH GRANTS COMPENSATION FOR REMOVAL OF ALL OUTDOOR ADVERTISING BOARDS "LAWFULLY ERECTED UNDER STATE LAW."

(2) THE REMOVAL OF PETITIONER'S ADVERTISING BOARDS WITHOUT COMPENSATION CONSTITUTES A TAKING OF PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW, SINCE THE STATE STATUTE RELIED UPON TO DENY COMPENSATION HAD NOT BEEN ENACTED UNTIL AFTER PETITIONER HAD LAWFULLY ERECTED THE BOARDS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourteenth Amendment to the Constitution of the United States.

> "No state shall . . . deprive any person of life, liberty or property without due process of law."

2. Section 131(g) of Title 23 U.S.C. (the Federal Highway Beautification Act) is set forth as Appendix B.

3. Sections 5350, 5405, 5412, and 5485(a) of the California Business and Professions Code are set forth as Appendix C.

STATEMENT OF THE CASE

In 1965 the Federal government enacted the Federal Highway Beautification Act (Title 23, §§ 131(a) through 131(n)), calling for eventual removal of specified outdoor advertising displays located in non-business areas along federal primary or interstate highways. The federal law provided that this removal would constitute a "taking," and that "just compensation" be paid to the owner of the advertising display and to the owner of the real property. To finance this compensation, the federal government would pay seventy-five (75%) per cent of the compensation and the state government would be required to pay the remaining twenty-five (25%) per cent. To ensure compliance with the federal law, the states were required to enact enabling legislation or else suffer a ten (10%) per cent reduction in federal highway revenues.

Effective November 8, 1967, the State of California enacted laws to conform with the Federal Act, by amending its Outdoor Advertising Act at Sections 5200 et seq. of the California Business and Professions Code. The 1967 amendments were based entirely on the federal act, and contained the same provisions, prohibiting future placement of boards in non-business areas and requiring the eventual removal of existing displays upon payment of "just compensation." (Business and Professions Code § 5405.)

In 1974, 21 U.S.C. 131(g), governing compensation for removal of outdoor advertising displays, was amended to read as follows:

> "Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State Law."

The California legislature followed suit in 1975, amending the State Outdoor Advertising Act to provide for compensation "in all situations in which the federal government authorized compensation." (Business and Professions Code § 5412.)

Since its origin in the 1930's the California Outdoor Advertising Act has contained a provision now codified in Business and Professions Code § 5350, which provides as follows:

> "No person shall place any advertising display within the areas affected by the provisions of this chapter in this state without first having secured a written permit from the director or from his authorized agent."

The only sanction imposed by law for erecting displays prior to obtaining state permits was a penalty fee of $1.00. (Business and Professions Code § 5485(a).)

Petitioner, and others in the advertising industry, erected numerous outdoor advertising displays in the 1950's and 1960's, and in almost all cases the normal practice was to erect the boards prior to obtaining state permits. This practice was accepted and encouraged by the State of California, whose permit application forms contained blanks requesting information which could only be known as to already existing displays.

Respondent filed a civil action on May 5, 1972, seeking removal of four of Petitioner's boards under the Federal and

State Acts. Each of the four boards had been erected prior to obtaining state permits. Permits were issued as to all four boards, two permits being issued prior to November 8, 1967, and two permits being issued after November 8, 1967, the effective date of the amendments to the State Act.

The first trial in 1974 resulted in reversal on appeal. At the second trial in February, 1978, Respondent stipulated that the two boards for which permits had been obtained before November 8, 1967, should receive compensation. The trial court entered judgment in favor of Respondent as to the other two boards, holding that since their permits were obtained after November 8, 1967, they could be removed without compensation. Petitioner appealed, and the Court of Appeal of California, Fourth Appellate District, Division One affirmed the trial court's judgment on November 26, 1979. Both the trial court and appellate court held that the two boards had not been "lawfully erected under State Law" because their state permits had not been obtained prior to November 8, 1967.

HOW FEDERAL QUESTIONS ARE PRESENTED

Petitioner raised the issues of Section 5405 of the State Act and its co-relative Section 23 U.S.C. 131(g) of the Federal Act in its appeal and briefs to the Court of Appeal, and in its Petition for Hearing to the California Supreme Court. The issue of denial of due process is raised here as plain error under Federal Rule 401(d)2.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW IMPROPERLY CONSTRUES AND INTERPRETS 23 U.S.C. 131(g)

The test of whether displays which are removed under the Federal Act are entitled to compensation under 23 U.S.C. 131(g) is whether the board was "lawfully erected under state law." The sole basis for Respondent's claim that Petitioner's two boards were not lawfully erected under state law is that Petitioner had not obtained permits for the boards prior to November 8, 1967. The State argued that the displays were in violation of Business and Professions Code § 5350 which provides that a person shall not erect an advertising display "without first obtaining a written permit." Such reliance on § 5350, however, is erroneous. If § 5350 were the actual test, the only pertinent question would be, "Did Petitoner erect the two boards without first having secured a written permit?" The State, however, stipulated at the second trial that the two of Petitioner's boards, *which were erected prior to a permit being obtained*, but for which permits were issued prior to November 8, 1967, *were* entitled to compensation. Respondent has therefore admitted that boards built prior to a permit being obtained can be "lawfully erected under state laws." Therefore, based upon Respondent's own stipulation, an alleged violation of § 5350, in and of itself, is not sufficient to make erection of a board "unlawful."

Respondent and the courts below have gratuitously and improperly added an additional requirement to Business and Professions Code § 5350, viz; that a permit must be obtained

prior to November 8, 1967, for a board to be "lawful." November 8, 1967, was the effective date of the California amendment to the State Act which first authorized removal of displays for compensation and prohibited future erection of displays in non-business areas. Since it is clearly established that the boards were erected long before November 8, 1967, there is no legal or rational basis to deny compensation to Petitioner.

II

PETITIONER IS BEING DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW SINCE PETITIONER'S PROPERTY HAS BEEN DESTROYED UNDER A RETROSPECTIVE STATE LAW.

As has been shown in Section I of this petition, the State has uniformly construed Business and Professions Code Section 5350 to allow for construction of displays first and the obtaining of the permits afterwards. The stipulation by the State that boards with after-acquired permits can be granted compensation establishes that such boards cannot, on that ground alone, be held to not be "lawfully erected under State Law." Accordingly, the only "unlawfulness" now alleged by the State is that the two boards in question did not receive their permits until after November 8, 1967, the effective date of the State Law prohibiting future erection of boards in non-business areas. This law, however, was not enacted until *after* the subject displays had been erected and cannot, therefore, constitute a rationale for denying compensation. To do so would be retrospective application of the State Law.

The United States Supreme Court has held that a law cannot operate retroactively to deprive one of rights vested prior to the law's adoption. *Asiatic Petroleum Co. vs. Insular Collector of Customs*, 297 U.S. 666, 671 (1936) (held: judgment of Supreme Court of Philippine Islands reversed and remanded).

The State now seeks to deprive Petitioner, Outdoor Advertising, of its advertising boards under Business and Professions Code § 5412, which was enacted after the boards were erected. Petitioner's property interests in the boards had fully vested prior to the enactment of § 5412. Accordingly, to deprive Petitioner of its boards under § 5412 deprives Petitioner of its property without due process of law.

CONCLUSION

Petitioner urges that certiorari be granted and the decisions of the Court of Appeal of California and the Superior Court of San Diego County be reversed.

Respectfully submitted,

LEWIS, KROLL & COLE

By: DAVID K. KROLL

Attorneys for Petitioner

Appendices

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, ex rel. DEPARTMENT OF TRANSPORTATION, Plaintiff and Respondent, v. DESERT OUTDOOR ADVERTISING, INC., Defendant and Appellant.	4 Civ. No. 18272 (Super. Ct. No. 333184) OPINION

California Department of Transportation (Department) filed this action to enjoin continuing violation of the Outdoor Advertising Act (Bus. & Prof. Code, § 200 et seq.)[1]/ (Act) and for declaratory relief. The Department sought the removal of four outdoor advertising displays[2]/ owned by Desert Outdoor Advertising, Inc. (Desert), subject to removal under the Act allegedly without compensation.

FOOTNOTE 1: All section references are to the Business and Professions Code unless otherwise stated.

FOOTNOTE 2: Outdoor advertising displays are defined in sections 5202 and 5203 and are variously referred to in this opinion also as signs and boards.

Earlier in this action, summary judgment was entered in favor of the Department holding two of the displays bearing Department permit numbers 3979 and 14230 could be removed without compensation. A trial was then had on the other two signs (permit Nos. 14266 and 14231) and the court held the Act was unconstitutional and the displays could not be removed without compensation. Both parties appealed. This court in *People ex rel. Dept. of Transportation v. Desert Outdoor Advertising, Inc.* (1977) 68 Cal.App.3d 440, reversed both the summary judgment and the trial court judgment. The matter was remanded. We refer to that case for a more detailed description of those proceedings and the law relative to the issues presented in these proceedings.

At the second trial, the parties jointly stipulated to the facts and conceded the displays were not in a "business area"[3]/ thus requiring their removal under the law (see §§ 5205, 5405, 5407 and 5408). On the stipulated facts, the court held two displays (permit Nos. 3979 and 14226) had been erected before November 8, 1967, and had been issued permits before the effective date of the Act. There was no dispute these two signs were lawfully erected under state law and the owners were, therefore, entitled to compensation for removal of those displays.

FOOTNOTE 3: Section 5205 states: "'Business area' means an area within 1,000 feet, measured in each direction, from the nearest edge of a commercial or industrial building or activity and which is zoned under authority of state law primarily to permit industrial or commercial activities or an unzoned commercial or industrial area."

The other displays (permit Nos. 14230 and 14231) had been erected in 1967 before the November 8 effective date of the Act, but had no permits on that date. The permits were granted some time later, specifically on March 8, 1968 and August 2, 1968, respectively. The court held Desert was not entitled to payment of just compensation on removal because the displays were not "lawfully erected" on the effective date of the law.

Desert appeals from that portion of the judgment which denied it compensation for display numbers 14230 and 14231.

Since 1933, the California law dealing with outdoor advertising was concerned only with safety, structural stability and public decency. There were no "land use" type regulations which would restrict the location of billboards to particular areas, such as industrial or commercial zones. On November 8, 1967, the state adopted amendments to the Act which generally made the federal Highway Beautification Act (23 U.S.C., § 131) the law of California. The federal highway act put added emphasis on esthetic considerations preserving the scenic beauty of lands bordering the federal roads (§ 5226; 23 U.S.C. § 131, subd. (a); *People ex rel. Dept. Public Wks. v. Ryan Outdoor Advertising, Inc.*, 39 Cal.App.3d 804, 811).

There were, of course, a large number of nonconforming boards created by the 1967 legislation, but the earlier version of the Act provided any signs "lawfully in existence" on October 22, 1965, could remain until 1970 at which time they were to be removed with payment of just compensation (former §§ 5288.3a, subd. (a) and 5412, subd. (a), Stats. 1970, ch. 991). Boards erected between October 22, 1965, and

the date of the amended Act (Nov. 8, 1967) could remain until July 1, 1970, and the law provided these could be then removed without just compensation (see *People ex rel. Dept. Pub. Works v. Adco Advertisers,* 35 Cal.App.3d 507, 512; see also § 5410 and former § 5412 re Jan. 1, 1968 date).

In 1975, however, the state and federal law was amended to require just compensation for all outdoor advertising displays not in conformity to the 1967 amendments if such display was "lawfully erected under State law" (§5412;[4]/ 18 U.S.C., § 131, subd. (g)[5]/). The

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FOOTNOTE 4: Section 5412 reads:

"If federal law requires the states to pay just compensation with regard to the removal of any advertising display, the owner or owners of such advertising display and the owner or owners of the land upon which such display is located, shall be paid just compensation. The sole intent of the Legislature in enacting this section is to comply with federal law, and it is otherwise not the intent of the Legislature to in any manner relinquish any of its powers relating to the removal of advertising displays under the police power."

FOOTNOTE 5: 23 U.S.C. section 131, subdivision (g), states: "Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

"(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

"(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon."

two boards in question were erected after October 22, 1965 and before November 8, 1967, but Desert did not file the application on number 14230 until March 8, 1968, and the permit was issued that day, and it did not file the application on number 14231 until July 12, 1968, and the permit was issued August 2, 1968.

It was conceded these boards were not in a business area as defined and are subject to removal; the only issue presented is whether they were "*lawfully* erected" on or before November 8, 1967, to entitle Desert to just compensation on their removal.

In *People ex rel. Dept. of Pub. Wks. v. Golden Rule Church Assn.* (1975) 49 Cal.App.3d 773, the Court of Appeal faced the same issue in interpreting former section 5412, which required the display to be "lawfully in existence" on October 22, 1965, to be eligible for compensation. While speaking to a different version of the statute with a different effective date and dealing with a board erected before October 22, 1965, the case does define relevant terms. In that case, the court stated:

> "Next plaintiff maintains that defendant is not entitled to payment of compensation after removal of the billboard. Although no claim has been filed as provided for in Business and Professions Code section 5288.3b (now renumbered § 5413), it is appropriate to consider the question of compensation because of the declaratory relief allegations contained in plaintiff's complaint. The uncontradicted evidence establishes, and the trial court found, that defendant did not obtain a state outdoor advertising permit for the billboard until May 4, 1966. Business and Professions Code section 5260 (renumbered as Bus. & Prof. Code, § 5350 in 1970) has provided since 1939

> that 'No person shall place any advertising display within the areas affected by the provisions of this chapter in this state without first having secured a written permit from the director or from his authorized agent.' Since the sign was not authorized by a written permit on October 22, 1965, as required by section 5260, it was not 'lawfully in existence' on that date. We conclude, therefore, that the sign may be removed without payment of compensation." (*Id.*, at pp. 776-777.)

We have stretched our imagination to find a difference between "lawfully in existence" and "lawfully erected" as suggested by Desert, but we cannot. The law set forth in *Golden Rule Church Assn., supra,* is clearly dispositive of the issue here.

It must be conceded the displays here were erected before the date of the Act, but this is not to concede the work was lawfully done. The fact that it was general practice for advertisers first to construct the display, then apply for a permit, the penalty being minimal, does not make the erection lawful until the permit is granted. Section 5350 (formerly § 5260) provides: "*No person shall place any advertising display* within the areas affected by the provisions of this chapter in this state *without first having secured a written permit* from the director or from his authorized agent." (Italics added.)[6]/ The legislative requirement that a permit be secured first is a prerequisite to the lawfulness of the display.

FOOTNOTE 6: Advertising display is defined in section 5202 as a sign or an advertising structure, which in turn is defined as (see § 5203) a structure of any kind or character erected or maintained for outdoor advertising purposes, upon which any poster, bill, printing, painting or other advertisement of any kind whatsoever may be placed, including statuary, for advertising purposes.

We note with interest the careful language of section 5412, which provides no latitude for liberal compensation for signs removed.

Desert argues the requirement a permit be obtained is a ministerial act only and has nothing to do with the lawfulness of the sign's erection. We submit the issuance of the permit involves more. It involves a determination the display complies with local zoning (§§ 5324, 5352), consent of the property owner (§ 5354), and approval of acceptable construction design (§ 5401), as well as location (§§ 5403, 5404, 5405, 5408, 5408.1). Those determinations must be made before the sign is lawful (see § 5358).[7]/ If the law requires the display to be lawfully erected as of a certain date, we know of no authority to authorize a nunc pro tunc determination. The signs under permits 14230 and 14231 were not lawfully erected on November 8, 1967. No compensation is available for those displays.

Judgment affirmed.

Coleman, J.

WE CONCUR:

Brown, P.J.

Work, J.*

*Superior Court Judge sitting under assignment by the Chairperson of the Judicial Council.

FOOTNOTE 7: The cited section numbers in this paragraph reflect the numbers persently applicable to the law involved (see *People ex rel. Dept. Pub. Wks. v. Adco Advertisers, supra,* 35 Cal.App.3d 507, 509, fn. 2).

23 UNITED STATES CODE §131(g)
(AS AMENDED, 1974)

"(c) Subsection (g) of section 131 of title 23, United States Code, is amended by striking out the first sentence and inserting the following in lieu thereof:

> 'Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law.'"

BUSINESS AND PROFESSIONS CODE OF THE STATE OF CALIFORNIA

Section 5350

"No person shall place any advertising display within the areas affected by the provisions of this chapter in this state without first having secured a written permit from the director or from his authorized agent."

Section 5405

"Notwithstanding any other provision of this chapter, no advertising display shall be placed or maintained within 660 feet from the edge of the right-of-way of, and the copy of which is visible from, any interstate or primary highway * * * other than the following:

(1) "[Directional signs]"

(2) "[For sale signs]"

(3) "[On-site advertising]"

(4) "[Message display centers, etc.]"

(5) Advertising displays erected or maintained pursuant to regulations of the director, and not inconsistent with the national policy set forth in subdivision (f) of Section 131 of Title 23 of the United States Code and the standards promulgated thereunder by the Secretary of Transportation, and designed to give information in the specific interest of the traveling public."

Section 5412 (As Amended, 1975)

"* * * If federal law requires the states to pay just compensation with regard to the removal * * * of * * * *any* advertising * * * *display, the owner or* owners of such advertising * * * *display and the owner* or owners of the land upon which such * * * *display is* located, * * * shall be paid just compensation. The sole intent of the Legislature in enacting this * * * *section* is to comply with federal law, and it is otherwise not the intent of the Legislature to in any manner relinquish any of its powers relating to the removal of advertising displays under the police power."

Section 5485(a)

"(a) The permit fee for each advertising sign is fifty cents ($0.50) for an original permit and for each annual renewal thereof, except where the applicant has placed or maintained any such sign without a valid, unrevoked and unexpired permit therefor, the fee for any issuance of the first permit thereafter is one dollar and fifty cents ($1.50), one dollar ($1) of which is the penalty."